



SHORELAND ZONING NEWS

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Please Share

For over 15 years, the Shoreland Zoning News has been helping town officials better understand the common issues surrounding shoreland zoning administration and enforcement. At least that is the feedback we've been getting. Unfortunately, we also hear that the News is not getting to everyone who would like to see it.

We keep our costs and mailing list manageable by sending four copies to one locally designated contact person to distribute to the selectmen, planning board, appeals board and code officer. If you are the contact person, please make sure the newsletters reach the other municipal officials.



DEADLINE FOR AMENDING SHORELAND ZONING ORDINANCES NOW EXTENDED

As we have informed readers previously, the Board of Environmental Protection amended the *State of Maine Guidelines for Municipal Shoreland Zoning Ordinances* (Guidelines), effective May 1, 2006. The amended Guidelines do not immediately affect a municipality's ordinance. The Guidelines' amendments must be incorporated into a local ordinance before they become effective.

For various reasons, the Board of Environmental Protection has recently extended the deadline for municipalities to update their respective ordinances, consistent with the standards in the Guidelines. The previous deadline, July 1st of this year, has been extended by one year to July 1, 2009. If your municipality has not begun that process you will still need to do so promptly. There are several reasons for this one-year extension to the deadline.

One fairly significant change within the amended Guidelines is the regulation of areas within 250 feet of freshwater wetlands that are newly rated as either moderate or high value by the Department of Inland Fisheries and Wildlife (IF&W) for waterfowl and wading bird habit. The previous Guidelines required areas within 250 feet of non-forested freshwater wetlands that were rated moderate/high value by the Department of Inland Fisheries and Wildlife (IF&W), as of the year 1973, to be zoned for Resource Protection. The revised Guidelines now use the IF&W wetlands ratings as of May 1, 2006.

For most municipalities the updated ratings will result in additional areas being zoned for Resource Protection. As municipa-

lities have begun applying the May 1, 2006 data to their local shoreland zoning maps it has become apparent that the data provided by IF&W contains some inaccuracies. After having discussions with IF&W regarding the problems we encountered with the data, they agreed to review the data for each municipality. Because they are re-evaluating the data in every municipality, one municipality at a time, they do not expect to complete the revisions until October 30th of this year. For this reason alone we had no other reasonable choice but to extend the deadline in order to afford municipalities the opportunity to use the best data possible.

As the data is updated, IF&W notifies us of the municipalities completed and we in turn prepare and mail paper copies of a new map along with a memo explaining the situation. As you move forward with your amendments, if you find you would benefit from receiving the new data sooner, please contact us and we will add your municipality to a "priority list" for IF&W. If you wish to download the data layer, it is maintained on the Maine Office of GIS at the following address: <http://megis.maine.gov/catalog/>.

Otherwise, one other factor contributing to the deadline extension is the simple fact that only a small percentage of municipalities updated their ordinances after the first year and a half since the revisions to the Guidelines became effective. It became obvious that municipalities needed more time to complete the changes locally. Please do make a note though that we do not intend to extend the deadline beyond July 1, 2009!

Timber Harvest Standards vs. Other Vegetation Standards

As municipalities have been updating their ordinances, a number of you have contacted us regarding the various options related to the standards for timber harvesting. Hopefully you recall the 3 different options your municipality should consider:

1. Repeal all timber harvest provisions from your local ordinance and the Department of Conservation, Maine Forest Service eventually will administer and enforce timber harvesting in the shoreland zone in your municipality;
2. Adopt the new statewide timber harvesting standards verbatim and your municipality will still administer and enforce timber harvesting locally, but the Maine Forest Service will provide assistance if desired;
3. Retain your existing timber harvesting standards and your municipality still has the authority to administer and enforce timber harvesting, but the Maine Forest Service will NOT provide any local assistance.

Actually, the real purpose of the article is not to re-summarize the nuances related to the new timber harvesting standards, but to clear up some confusion. We have been finding that some municipalities are under the impression that yielding timber harvest regulations to the Maine Forest Service also implies that the Maine Forest Service will administer and enforce the other vegetation clearing standards (entitled "*Clearing or Removal of Vegetation for Activities Other Than Timber Harvesting*").

Even if a municipality repeals its timber harvesting standards it will still administer and enforce all other vegetation clearing or removal within the shoreland zone. Maine Forest Service has generally not assisted with the administration and enforcement of these standards in the past, nor will they do so now. Should you have a need for assistance with the vegetation clearing standards, please contact one of us in the DEP's Shoreland Zoning Unit.



What Size Monetary Penalty is Appropriate???

Very frequently we are asked by CEO's for assistance with shoreland zoning violations. Commonly we are asked to confirm that a violation has occurred and if so, then to also discuss the next step. Also, many of the violations we tend to hear about are the more significant violations that occur in the shoreland zone, or are simply more complicated.

But, one of the most common questions we hear is: "How much should the fine be?" The answer, perhaps not surprisingly, is "it depends". There are many variables to consider when determining a monetary penalty for a violation, such as the significance/extent of the violation, whether there are multiple violations, whether the violator has previous similar violations, to what extent will remediation return the site back to normal, how the violation compares with other violations, the cooperation of the violator, etc...

Most, if not all municipalities have yet to establish a penalty policy to calculate fines so this task continues to be somewhat subjective. However, in an effort to help municipalities to have a better idea of what to impose for a fine, we are highlighting a sampling of typical fines that municipalities have imposed in cases we are familiar with. Please realize that: 1) the dollar figures shown takes into consideration all the variables discussed above; and 2) while the dollar amount for a fine can be somewhat discretionary in some cases, the mitigation of the violation (replanting vegetation, removing an illegal structure, etc.) is mandatory. Also note that these examples are mostly all from Administrative Consent Agreements, not court actions.

- Windham– cutting violation, Pleasant River \$5,000
- Kittery– cutting violation, Spruce Creek \$10,000
- Cumberland– cutting violation, Chebeague Is. \$5,000 + atty fees.
- Waterboro– illegal deck \$5,200
- Waterboro– illegal deck #2 \$9,000 (includes atty. fees)
- Brunswick– cutting violation, Mere Point \$3,500 (note: violation was the removal of 4 out of only 5 trees that had been in the buffer– see how a policy such as \$100/tree is not always appropriate?)

Miscellaneous Notes From the SLZ Unit...

Rich Baker (287-7730) remains the State's shoreland zoning coordinator in our Augusta office and Mike Morse (822-6328) continues as the shoreland zoning coordinator for the Southern Maine Regional Office in Portland. Eric Hitchcock (764-0477) is our shoreland zoning coordinator in our Presque Isle office. The black fly season should be in full swing in Aroostook County about the time you receive this newsletter.

Jenn Cayer who worked out of our Eastern Maine Regional Office in Bangor, has recently left her position at DEP to pursue other opportunities for her and her family. She has also officially attained the title "Flatlander". Jenn will be missed by many of us. Good luck, Jenn! (We anticipate being able to fill her vacated position sometime in the near future)

If you have any shoreland zoning related questions please contact the person above who is assigned to your area. Questions from the Eastern Maine Regional Office (Bangor) area should be addressed to Rich or Mike, until Jenn's replacement is hired.

(Continued from page 2)

- Yarmouth— cutting violation \$2,500
- Yarmouth— cutting violation #2 \$2,500

DEP's Tales from the Courtroom...

The DEP has been involved in a case in Cushing recently due to a Stormwater Management Act violation and a shoreland zone tree cutting violation. DEP became involved in the case after the town's selectboard repealed a Notice Of Violation for the violation issued by the CEO. The DEP eventually reached a \$20,000 settlement during a court-directed mediation hearing. Replanting was also required within the buffer strip.

Just when you think the case is resolved, the violator replanted the required number of trees, but mostly outside the buffer and only along the sides of the clearing, thereby retaining a clearing to the water. After no cooperation by the violator, DEP went back to court seeking a contempt order, requiring replanting of more trees to eliminate the clearing. The judge told ruled we were not specific enough in wording the mediation agreement as to where the trees needed to be planted and therefore no further action was warranted. Moral of the story is to make sure that as you pursue compliance that you are very specific and concise in your requirements of a violator!

Oh, as for the town, with a 'little nudge' from the DEP, the town realized the importance of upholding the integrity of its local ordinance and has since chosen to also take the violator to court for the replanting of more trees and also a fine. This case is still pending and as we understand it the Town is seeking the statutory minimum \$100/day/violation penalty to be imposed on the violator. Stay tuned...

Supreme Court Weighs in on 'Undue Hardship'

The Town of Beddington recently had a favorable experience in court. Owners of a small waterfront lot had been using the property for parking, picnics, barbeques and other recreational uses for some time. They eventually decided they would like to construct a camp on the small lot, but the new structure could not meet the minimum shoreline setback. The owner filed for a variance appeal with the board of appeals. Remember, in order for a board of appeals to grant a variance, the owner must demonstrate that without a variance the strict application of the terms of the ordinance would result in undue hardship. "Undue hardship" is defined by a four-part test, the first of which is that the land in question cannot yield a reasonable return unless a variance is granted (note: *reasonable*, not maximum return).

The appeals board determined that the owner already had a reasonable return on the property because they used the property for recreational purposes. The owners appealed the Board of Appeals' decision to Superior Court and eventually to the Maine Supreme Judicial Court. Through a Memorandum of Decision, the Supreme Court agreed with the Superior Court's conclusion that the Beddington Board of Appeals properly determined that the owner did not demonstrate undue hardship.

This case further reinforces that when variance applications are being reviewed by a municipal board of appeals, the undue hardship test should be strictly applied. Municipal board's of appeals should keep this decision in mind when reviewing variance applications.

And, please remember that municipalities are required by law to send a copy of all variance applications within the shoreland zone to the Department at least 20 days prior to the board of appeals hearing on the matter.

A brief word about public boat launching facilities...

Every so often we hear from a municipality regarding a public boat launching facility. Actually, we probably hear from folks such as the Maine Department of Inland Fisheries & Wildlife or Department of Conservation more frequently about public boat launches than we do municipal officials.

Often times an agency or organization is either given or sold a small piece of land, that is a new non-conforming lot when considering certain shoreland zoning development projects. It is not uncommon when a State agency or other organization proposes to construct a public boat launching facility that it causes much angst in abutters and other property owners on the waterbody on which the facility is proposed.

Many argue that the facility cannot be built because the new, small lot does not meet the minimum lot size for "public and private recreational facilities". In some cases such proposals have been denied by a municipality on this basis.

However, the Guidelines, and most local ordinances, exclude or exempt public boat launching facilities from these minimum lot standards by specifically excluding them within the definition of a "recreational facility". As such, there is no minimum lot size or shore frontage that must be met for a public boat launching facility and in many cases they should be granted a permit by the municipality.



Note Notes:

Please remember that when you send in your ordinance and map amendments for our review that they are certified as official copies, and that you must also include a copy showing exactly what the amendments are. For ordinance text amendments, a strike-out/ underlined formatted document is very helpful. When sending us your amended town map, many towns submit a copy of the original map with arrows hand-drawn pointing to the amended areas, or the amended areas circled or highlighted in addition to the certified official "clean" copy.

Contact Us:

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1-800-452-1942

VACANT, Bangor 941-4116
1-888-769-1137

Eric Hitchcock, Presque Isle 764-0477
1-888-769-1053

Mike Morse, Portland 822-6328
1-888-769-1036

Questions & Answers:

Q. Why does it take so long for DEP's Shoreland Zoning Unit staff to return my call or visit a site in the field?

A. The Shoreland Zoning Unit staff have been experiencing very heavy workloads over the past number of months. While some of this is likely an increase in day-to-day general assistance (phone calls, emails, site visits) to towns, a large part of it is attributed to an influx in the number of ordinances and amendments for us to review related to the May 1, 2006 Guideline changes.

While we have been expecting this increase in workload, we want you to be aware that we are still expecting around 300 ordinances to review as we receive them within the next year. We anticipate that our response to your calls for assistance may be slowed further. We also expect that our time available for field assistance will also be reduced. Remember to bring your digital camera on-site with you so you can email pictures to us. This may save us all a lot of time!

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